United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

31

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24, 109

UNITED STATES OF AMERICA,

Appellee

-v-

ALFRED J. MEACHUM,

Appellant

BRIEF FOR APPELLANT

APPEAL FROM VERDICT OF JURY IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Maurice A. Guervitz
1010 Vermont Avenue N.W.
Washington, D.C. 20005
Appointed Counsel for
Appellant

TABLE OF CONTENTS (Cont'd)

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is founded on 28 U.S.C. 1291.

STATEMENT OF ISSUES PRESENTED

I The verdict of the jury with respect to the First Count was contrary to the evidence and to the law.

II The Trial Judge erred in submitting the First Count to the Jury and further erred in instructing the Jury in connection with the First Count.

III The Trial Judge erred in failing to direct a verdict of acquittal with respect to the Fourth Count of the indictment.

IV The Court erred in permitting identification evidence to be presented to the Jury.

V The failure to have counsel present at photographic confrontation on December 12, 1968, was a violation of defendant's Constitutional rights.

VI The Court erred in admitting evidence by Officer Zimmerman respecting fingerprints of the defendant taken on December 11, 1968.

VII The Trial Court erred in permitting evidence of the taking of the fingerprint from the automobile to be presented to the Jury.

VIII The Court erred in failing to instruct the jury that the Government must prove each and every essential element of the crime charged in the First Count, beyond a reasonable doubt.

IX The Court erred in failing to grant motion for judgment of acquittal.

X The Government committed error when the prosecutor in his summation commented on defendant's failure to take the stand.

Note: The pending case was never previously before this Court.

REFERENCES TO RULINGS

Objections and Rulings	Transcript Page	Date
1. Defendant's objection and request for a mistrial regarding prosecutor's opening statement indicating that the Government found defendant's fingerprints on the automobile. Motion denied	27, 28	1-14-70
2. Motion to strike testimony of witness Geraldine Downey as to identification of defendant. Motion denied.	66, 67	1-14-70
3. Renewal of defendant's motion to strike testimony of witness Downey regarding identification. Motion denied	75	1-14-70
4. Defendant's objection to Government Exhibit No. 7, fingerprint car. Overruled by the Court.	119,120	1-15-70
5. Defendant's objection to government witness Forester testifying before Jury prior to preliminary hearing outside hearing of jury. Overruled by Court.	129	1-15-70
6. Defendant's objection to testimony regarding comparison of fingerprint lift. Overruled.	130	1-15-70
7. Defendant's objection to admission of Government Exhibit No. 9, photograph of fingerprint. Overruled by the Court.	160	1-15-70
8. Defendant's motion for judgement of acquittal. Motion for acquittal denied.	162, 168	1-15-70
9. Renewal of defendant's motion for judgment of acquittal. Overruled by the Court.	269	1-16-70

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,109

UNITED STATES OF AMERICA,

Appellee

-v-

ALFRED J. MEACHUM,

Appellant

Appeal from Verdict of the Jury in the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

Statement of the Case

The appellant, hereinafter referred to as "defendant" or "appellant", was indicted by the Grand Jury under a four-count indictment charging the defendant as follows:

First Count: (Violation: 18 U.S.C. 2113(a))

"On or about October 25, 1966, Alfred J. Meachum by force and violence and by intimidation took from the person and presence of Geraldine Downey, one money bag of the value of $20.00

and $11,856.00 in money, belonging to and in the care, custody, control, management and possession of the Department of Justice Federal Credit Union, a body corporate, an institution chartered by the Bureau of Federal Credit Unions, United States Department of Health, Education and Welfare."

Second Count: (Violation: 22 D.C. Code 2901)

"On or about October 25, 1968, * * * * * * * took from the person and from the immediate actual possession of Geraldine Downey, property of the Department of Justice Federal Credit Union, a body corporate, * * * * *."

Third Count: (Violation: 22 D.C. Code 502)

"On or about October 25, 1968, * * * * Alfred J. Meachum assaulted Geraldine Downey with a dangerous weapon, that is, a pistol."

Fourth Count:

"On or about October 25, 1968, * * * * * Alfred J. Meachum assaulted Ronald O. Boyd with a dangerous weapon, that is, a pistol."

Trial in the Court below was before a jury. The defendant was found guilty by the jury on Counts One, Three and Four. After a presentence investigation, the Court pronounced that the defendant be committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of from four to twelve years on Count One; one year to three years on Count Three; and one year to three years on Count Four, all sentences to run concurrently with the sentence under Count One.

Defendant did not take the stand but through witnesses presented alibi testimony in an attempt to prove that he was elsewhere in the city on the aforesaid date at the time said alleged robbery was committed.

EXCERPTS OF AND REFERENCES TO PERTINENT TESTIMONY

The trial below commenced on January 14, 1969. The government's first witness was Mr. Herbert B. Abell, who stated that on October 25, 1968, he was the Assistant Manager and Assistant Treasurer of the Department of Justice Federal Credit Union (Tr. pp. 29-39). He testified (Tr. p. 35) that on October 25, 1968, he gave Mrs. Geraldine Downey, $11,850.00, as shown by a Change List that he had prepared for Mrs. Downey on on said date. (Government's Exhibit No. 2). He stated that the Department of Justice Federal Credit Union was not a corporation under the "normal sense"; that "Well, I don't know that it is exactly called a corporation. The Act provides for methods of forming this, it is a cooperative venture really,

and it started as a cooperative venture * * * * * * * * * to my knowledge, the Act does not specifically use the word "corporation" (Tr. pp. 38,39 and 40).

Mr. Abell further testified, in answer to government counsel's inquiry as to "Who owned the money?" "The money is owned by the members, the so-called shareowners, all members of Credit Union have common ownership." (Tr. 40 and 41)

Mrs. Geraldine Downey (Tr. pp. 41-74) was the next government's witness. She testified that she received the aforesaid money on said date and that she proceeded to the Immigration Office at 8th and M Streets, Southeast; that she arrived there about 10 minutes to 10:00 o'clock A.M. (Tr. pp. 42 and 43). She stated that as she walked into the lobby of the building, she was approached by a man; that he put a gun in her face and told her not to scream, at the same time taking the satchel containing the said money out of her hand; that she screamed; that the man shoved her down, and went out the door. She said there was another man there but she did not see him. (Tr. p. 44). The witness stated that one of the building guards from the floor above came running down the steps; that she told the guard she had been robbed and "that they were going out the door, and I was in the process of getting up when the guard came down the

steps." (Tr. p. 44)

Mr. Alto, the government's attorney, asked the witness whether she could identify the person who took the satchel. At this point counsel for the defendant requested an identification hearing outside the presence of the jury, which request was granted by the Court.

Hearing out of presence of Jury: (Tr. pp. 47 - 61)

Mrs. Downey related the circumstances surrounding her identification of the defendant from photographs presented to her on December 13, 1968, by Special Agent Ben Helsel of the F.B.I. She identified nine photographs (Government's Exhibit No. 4 for identification) which she testified were shown to her by said special agent at her place of employment on December 13, 1968. She then indicated a photograph of the defendant which she stated she had selected on December 13, 1968. Said photograph was marked "Government's Exhibit No. 4-A."

Mrs. Downey also identified Government's Exhibit No. 3 as a photograph of a line-up held on December 17, 1968, at which time she was present, and in which line-up the defendant was present. She identified the defendant in the photograph as the seventh person in that line-up.

On cross-examination, Mrs. Downey was asked by counsel for defendant whether she ever gave the policy any description of the man who held the gun in her face. She stated she did not. (Tr. p. 53) She was then asked, "Isn't it a fact that you said you could not give them a description?" She answered, " I did." (Tr. p. 53) She stated she could not remember how many of the photographs she had seen before she picked out the photograph of the defendant, but that she had not seen all of them before she identified Mr. Meachum. (Tr. p. 55)

She was asked how many times after the incident on October 25, 1968, was she interviewed by officers of the police department. She answered, "Gee, I can't tell you. It was quite a few, so many that I wouldn't be able to remember. They were all coming at me at one time." (Tr. p. 56)

Mrs.Downey was asked the following questions and she replied as follows: (Tr. pp. 57 - 60)

Q: And prior to - when is the last time that you were interviewed about this occurence prior to December 13, 1968 by either the Police Department or members of the F.B.I.

A. I don't remember. It was quite a time between. I don't remember.

Q. And on each of these occasions, isn't it true that you told these officers and members of the F.B.I. that you could not identify?

A. I didn't think I could, yes.

* * * * * *

Q. And what caused you to change your mind?

A. Just the picture itself. Of course, when I was first interviewed, I was excited and naturally - then the more I thought about it, the more I knew that I had seen him because I had turned around and the gun was in my face and I knew that I had to have seen him. Maybe I was trying to block the picture out of my mind. I don't know. But then the minute I saw the picture, I knew that this was the man. So that is all I could tell you. This was the only way I was able to.

Upon conclusion of the testimony taken out of presence of the jury, counsel for the defendant moved to strike testimony of witness Mrs. Downey, on the ground that she based her identification on the photograph shown to her by the special agent and not from an independent source. The Court denied defendant's motion.

Resumption of testimony before Jury:

The jury was then called back to the Courtroom and Mrs. Downey resumed testifying before the jury. In answer to inquiry by government counsel, the witness pointed out the defendant as the person who held the gun on her and took her satchel on October 25, 1968. The witness stated that the next time she saw the defendant was on December 17, 1968, at a line-up. She identified the defendant in the line-up photograph

which was admitted into evidence as Government's Exhibit No. 3.

Mrs. Downey further testified that on December 13, 1966, she viewed nine photographs at the Department of Justice Credit Union office which were presented to her by Special Agent Helsel of the F.B.I. She stated that she identified the defendant's photograph and that she recognized the defendant "strictly by sight" after viewing the photographs.

On cross-examination Mrs. Downey replied that the alleged robbery took place about ten minutes of 10 A.M.; that she talked to the police immediately thereafter.

The following questions were asked by defendant's counsel and the witness replied as follows (Tr. pp. 72, 73, 74)

> Q. Did you tell the police officer at that time that you could not identify any one of the two men?
>
> A. Yes, sir.
>
> Q. Now, also, you spoke to the officer and members of the Federal Bureau of Identification on other occasions after?
>
> A. On a few other occasions, there weren't many' no.
>
> Q. A few occasions? Could you give us an idea after the date of this occurence of the offence, when you first talked to police, when was the next time you talked to any of the officers or the F.Bi.I. about this matter?

A. Within a few days. I don't remember the exact time. It was shortly thereafter.

Q. And at that time, you also told the officers you could not identify anyone of them?

A. I did not think I could, no.

Q. You told the officers that you could not identify either one of the men, is that correct?

A. That is right.

Q. And you also spoke to the officer, the F.B.I., you say on another occasion after the second occasion?

A. I believe there was another time.

Q. And how long prior to December 13, would you say you spoke to the other officers?

A. Well, it was probably 2 or 3 weeks before. At least 2 or 3 weeks, I don't remember.

Q. At that time, you repeated you could not identify either one of the men?

A. That is right.

Q. 13th of December 1968? Prior to that time, you never told anyone that you could identify either one of these men who attacked you, is that right?

A. No.

Q. That is correct?

A. That is right.

Upon conclusion of Mrs. Downey's testimony, defendant's counsel moved to strike Mrs. Downey's testimony as to identification, or that a mistrial be granted. The Court denied said motion. (Tr. p. 75)

Benjamin G. Helsel, Jr., Special Agent for the Federal Bureau of Investigation was called as the next witness for the Government. (Tr. pp. 76 - 80) He testified that on December 13, 1968, he took nine pictures to Mrs. Downey at her place of employment in the Department of Justice Credit Union; that he asked her to view them and to identify anybody from those pictures as being one of the two men who had robbed her on October 25, 1968. (Tr. p. 77) He stated she selected the defendant's picture. He further stated that he was present at the line-up on December 17, 1968. He said the nine photographs (Government's Exhibit No. 4, for identification) shown to Mrs. Downey were photographs showing the body of each from about just below the shoulders up.

Ronald O. Boyd was then called as a witness for the Government, (Tr. pp. 81 - 87). He testified that on October 25, 1968, he was employed as a guard for the G.S.A. at the Immigration and Naturalization Service building at 8th and M Streets, S.E.; that between 9:30 and 10 o'clock he was stationed at his

post at the top of the stairway; that around 10 o'clock he heard a very loud scream and when he ran down the stairway, he saw Mrs. Downey laying at the bottom of the stairway; that he noticed two men running very fast on the other side of H (8th) Street; that the "shorter guy" turned and "fired a couple shots at me." He stated when he first saw the two men they were approximately 200 feet away from him.

Mr. Boyd testified that he gave the police a description, that the man who shot at him was light-complectioned and was shorter than he, about 5' 8"; that the man was attired in "khaki's and old jacket, green jacket, and something like that, dark clothing."

On cross-examination Mr. Boyd answered that he could not state whether or not the defendant was the man who fired at him. He stated he had known the defendant since birth, that he believed if the person who had fired at him was the defendant or somebody else that he knew, he would have "noticed something about him, because I can recognize somebody I know at a greater distance." (Tr. p. 86). He further answered that though he could not say, he did not believe that the man he saw running and who shot at him was anyone he knew. He stated it was daylight at the time.

Mr. Boyd further stated that he had good full vision of the man for a glimpse; that he saw half of the man's face when he spun to the left and fired.

Clarence B. Mills, (Tr. pp. 88-92), the next government witness, stated that he was operating a District vehicle pick-up truck, that as he was approaching the intersection of 8th & M Street, on the south side of M. that he heard a screaming noise like that of a lady; that he observed two men running from the building on the northwest corner of 8th & M Streets, S.E. He stated the tallest one, the one carrying a tan attache case, wheeled and fired two shots from a nickle-plated pistol; that said man got into a white Javelin with Maryland tags, which was parked on an old parking lot, and drove off.

Mr. Mills stated he next saw the car in an alley south of K Street in the vicinity of 13th Street, S.E; that he gave a description of the two men to the E.B.I. later that day. He stated that one of the men was approximately 5 foot 6 inches tall, the other approximately an inch or so smaller; that the taller of the two had a bright green peaked cap, a dark jacket or a coat; that the skin of the taller man was of light brown color and that of the smaller one a little darker.

Neil M. Woodcock was the next government witness (Tr. pp. 94 - 98) and he testified that on October 25, 1968, he was driving a bus for the D.C. Transit Co.; that about 10 o'clock that day he was stopped at a layover point on Potomac Avenue between 8th and 9th Street, S.E.; that he heard a couple of shots and when he looked up from the newspaper he was reading, he saw some people get in a car, and slam the door; that as the car went around, he checked the back of it and wrote the tag number on a transfer slip. Said slip was marked Exhibit No. 5, for identification. The tag number of said car as shown by Exhibit No. 5, was C.A. 3859, Md. Said transfer slip was received in evidence over objection of defendant's counsel. He testified that the automobile was a light grey Chevrolet.

William T. Brooks was then called by the Government as a witness. (Tr. pp. 103 - 108). He stated that he was a Special Agent for the F.B.I.; that on October 25, 1968, he responded to the rear of 1324 L Street, S.E. and observed a white Rambler Javelin with Maryland license, C A 3859; that it was in the late morning. He said he took custody of the vehicle and accompanied it to the F.B.I. building at 3rd and D Streets, S.E.; that he turned said vehicle over to

Mr. Forrester, F.B.I. Identification man. He stated that he stayed throughout the entire examination of the automobile and saw Mr. Forrester go over the automobile for finger prints; that when Mr. Forrester finished the witness retained custody of the automobile.

Morris William Zimmerman, Metropolitan Police Department, Identification Services, was the next witness for the Government. (Tr. pp. 115 - 121) He testified that his duties with the Police Department consisted of identifying through fingerprinting and photographing all defendants "who are arrested by the Metropolitan Police Department." (Tr. p. 115) He then outlined the method used by the Police Department in taking fingerprints.

Government's Exhibit No. 7 was marked for identification. The witness identified said exhibit as a fingerprint card for the defendant; that "it is an F.B.I. fingerprint card for their files. We make one for each defendant for the F.B.I., and this is a photo of the original." (Tr. p. 117) He further testified that on this card is shown the defendant's last name, Meachum, his first name, Alfred, his height, weight, etc; that the defendant is asked to sign the card but in this particular time defendant Meachum printed his

name. The officer further testified that "On the back we have his home address, and the date of arrest and the charge. This, other than the signature, everything is done by me. Then we have on here a full set of defendant's fingerprints. * * * * of each finger of the right hand in the appropriate box, and a full set of the fingers of the left hand." (Tr. p. 117) The witness then identified the defendant as the person whose fingerprints the witness took and whose fingerprints are shown on the card. (Tr. p. 118)

Government counsel then asked the witness, "Officer, can you tell what date you took these fingerprints from the defendant?" The witness replied: "December 11, 1968". (Tr. p. 118)

The Government then moved for admission of Exhibit 7. Counsel for the defendant then requested a bench conference at which time he objected to the introduction of Exhibit No. 7 and called attention to the fact that said fingerprints were taken on December 11, 1968, two or three days prior to December 13, 1968 at which time the first identification of the defendant was made by Mrs. Downey. Defendant's objection was over-ruled by the Court and Government's Exhibit No. 7 was received in evidence.

Robert D. Forester was then called as the Government's next
next witness. (Tr. pp. 122 - 144) He stated he was employed by the Federal Bureau of Investigation as a fingerprint examiner and gave his background and experience. He stated that on October 25, 1968, Special Agent William Brooks delivered an automobile to him to be processed for fingerprints; that it was a 1969 two-door white Javelin, that is a Rambler-type automobile, with Maryland license number CA-3859; that he immediately commenced processing said vehicle for fingerprints.

Government counsel then marked Government Exhibit 8 for identification; also Government Exhibit 9 for identification.

The witness identified Exhibit 8 as a lift of a finger-print and he explained the process in connection therewith. He stated that the lift was an actual fingerprint that was developed on said automobile; that he developed the fingerprint himself. He stated that, "This came from the left fron door glass. That is right next to where the drive would be, and it was in a position upside down, that is, it would have had to have been grasped. It was just below the top of the glass, approximately an inch and a half. It was in an upside down position. It would have had to have been grasped from the inside of that door, because in the area it was in, it would have been impossible to have turned the hand to place it in

that position. And it was approximately six inches in from the upper righthand corner." He stated that the fingerprint was the left middle finger of a "known individual." (Tr. pp. 127 - 128)

The witness then identified Government Exhibit No. 9, which he stated was a photograph of the lift of said fingerprint. He also identified Government Exhibit 7, which he stated he had seen before, as a fingerprint card "that is a part of our records for one Alfred Joseph Meachum." (Tr. p. 129)

The witness then testified that he had made a comparison between the lift marked as Government's Exhibit 8 and the fingerprint card of Mr. Meachum, marked Government Exhibit 7. Defendant's counsel made objection to said testimony, but was over-ruled by the Court (Tr. p. 130) Mr. Forrester stated that the fingerprint that appeared on Government Exhibit 8, being the lift which he took was made by the same finger that made the fingerprint (left middle finger) on the fingerprint card which was marked Government's Exhibit No. 7. (Tr. pp. 130 - 131)

The witness further testified as to methods of comparison and as to how he arrived at the aforesaid conclusion.

Government counsel then moved for the admission of Exhibit 6 into evidence and same was received over defendant's objection (Tr. p. 133)

On cross-examination Mr. Forrester was asked where did he look for fingerprints in connection with his examination of the automobile. The witness stated that he covered the entire car, particularly the windows, the steering wheel, the rear-view mirror, and any place that could have been handled or touched, including opening the trunk; that the print about which he testified was the only print of value he found belonging to the person whose fingerprints appear on the card (Government's Exhibit No. 7). (Tr. p. 141)

Government's Exhibit No. 9 (photograph of the lift of said fingerprint) was admitted into evidence over objection of defendant. (Tr. p. 160)

The government also offered its Exhibit No. 10, being an enlarged chart of the actual fingerprint lifted from the automobile and an enlargement of the known prints from the chart of defendant. Said exhibit was admitted into evidence over objection of defendant's counsel. (Tr. p. 160 - 161).

Government counsel informed the Court that he would not move for the admission into evidence of Government's Exhibit 4-A, being "mug" shots of the defendant that would be "prejudicial to the defendant." (Tr. p. 161)

The Government then rested its case.

Counsel for the defendant then moved for judgment of acquittal or in the alternative that the testimony of the complaining witness as well as the fingerprint evidence be stricken, for the reasons that the prosecution had not proven ownership of the funds, failure to prove the identification of the defendant beyond a reasonable doubt, failure to prove when said fingerprint was made, etc. (Tr. pp. 162-173.) Said motion was denied by the Court.

The defendant called as his first witness, Michael Meachum, who stated he was the cousin of the defendant and that on October 25, 1968, and for some time prior thereto, he lived with the defendant at 2408 Second Street, S.E. (Tr. pp. 185 -) He stated he got up at 5 of 10 on the morning of October 25, 1968, and that the defendant and one Bessie Smith were in the apartment when he awoke; that the defendant was already in bed when the witness went to sleep during the night before the 25th. He stated that he asked the defendant

to pay some traffic tickets for him, amounting to about $40.00; that he gave the defendant $40.00 that morning and that Bessie Smith and the defendant left their apartment about 10 A.M. that morning; that they were going downtown to pay the tickets. He stated he knew it was about 10 o'clock because he always looked at the time when he woke up in the morning. (Tr. pp. 188, 189, 190)

Defendant then offered into evidence Defendant's Exhibits 1 and 2, which consisted of two receipts from the Department of Motor Vehicles in the amounts of $30.00 and $100; both of said receipts showed date of payment on October 25, 1968. (Tr. p. 191) Said exhibits were admitted into evidence as Defendant's Exhibits 1 and 2. (Tr. p. 192)

The witness further testified that he obtained said receipts from the defendant when the defendant returned that evening.

The witness testified that said 2804 Second Street, S.E., is located near the intersection of Nichols Avenue and Porter Street, in the Congress Heights Section of Washington. (Tr. pp. 207 - 209)

Bessie Smith was the next witness for the defense (Tr. pp. 212 - 224) She testified that on October 25, 1968, she went to the defendant' home at 2804 Second Street, S.E., to borrow a card table to be used for a party the next day

that she arrived at the defendant's home about a quarter of 10 in the morning; that she lived around the corner from the defendant's home. She stated that the night before the defendant had asked her to wake him up in the morning because he said he was going to look for a job; also, that she wanted to pick up the card table (Tr. pp. 213 - 214)

The witness stated that she and the defendant left his apartment about five after ten; that they walked to Nichols Avenue to catch a cab. From there they came to this Court building where the defendant was to see someone about a job; that they arrived about 10:30 or quarter to 11. She said the person whom the defendant was to see was not in his office and they both went down to the cafeteria for coffee, after which they went back upstairs and the defendant talked to the man he was to see. After that the witness said they proceeded to the building across the street from the building across from the Courthouse to pay the parking tickets for Michael Meachum; that the defendant paid said tickets and then they proceeded downtown to a store where she had to get some things for the party. She stated she then left the defendant; that he was going to see about a job. (Tr. pp. 214 - 217)

Joseph Tomlinson, the next witness for the defense, stated that he was employed by the Central Violations Bureau,

Court of General Sessions, District of Columbia, which Bureau collects money and processes the records for parking tickets; that the Bureau is located at 451 Indiana Avenue, about a block from this Courthouse. He stated that the office opened for business at 8:30 A.M. and closed at 7:00 on weekdays and and 4:00 on Saturdays.

The witness was asked to identify the aforesaid receipts Defendant Exhibits 1 and 2. He stated that they were Central Violations Bureau receipts and were the type of receipts issued for a payment of a parking, non-moving violation; that anyone who comes to pay receives a receipt of this type.

The originals of Defendant's Exhibits 1 and 2 were received in evidence and marked Defendant's Exhibits 3 and 4. (Tr. p. 245 - 247)

As to the receipt for $30.00 the witness testifed that the violation was for parking on private property; that the $10.00 receipt was for the violation of "Parallel Parking."

The witness stated that the receipts did not show the name of the person who paid the tickets but they show they were paid on October 25. 1968.

Upon request of defendant's counsel, the witness produced the records of the Bureau, a transaction sheet, to show what tickets were paid at the Bureau on October 25, 1968.

He stated that the tickets before the Court, Defendant's Exhibits 1 and 2, were paid sometime between 11:30 and 1:00 o'clock on October 25, 1968. (Tr. p. 250) He further stated that it was possible that these tickets could have been paid before 11:00 o'clock. (Tr. p. 250)

The defendant then rested his case. (Tr. p. 261)

After rebuttal testimony by the Government, the Government rested its case. (Tr. p. 268)

The defendant's counsel then renewed his motion for a judgment of acquittal. The Court denied said motion. (Tr. 269)

ARGUMENT

I

Was the verdict of the jury with respect to the First Count contrary to the evidence and to the law?

The first Count of the indictment charges that on October 25, 1968, the defendant "by force and violence * * * * took from the person and presence of Geraldine Downey * * * * * * in money, belonging to and in the care, custody, control, management and possesion of the Department of Justice Federal Credit Union, a body corporate, an institution chartered by the Bureau of Federal Credit Unions, United States Department of Health, Education and Welfare." (underlining supplied).

Appellant respectfully urges that the Government in presenting its case, failed to prove the following pertinent facts:

1. That the money alleged to have been taken belonged to the Department of Justice Federal Credit Union;
2. That the said money wastaken from the care, custody, control, management and possession of said Credit Union;
3. That said Credit Union was a body corporate and an institution chartered by the Bureau of Federal Credit Unions.

Mr. Abell, the Government's witness, testified that the so-called shareowners, all members of Credit Union have common ownership." Thus the testimony of the prosecution is in direct conflict with the charge in the indictment that the said money BELONGED to said Credit Union.

There was no testimony that the money was in the "care, custody, control, management and possession of the Department of Justice Federal Credit Union." Mr. Abell did testify that on October 25, 1968 Mrs. Downey was to go to the Immigration and Naturalization Building at 8th and M Streets, S.E., for

the purpose of transactint business and cashing salary checks. He stated he prepared a Change Fund that contained the various denominations of money given to Mrs. Downey for the purpose of transacting business at said Immigration Service. In answer to the question "who gave the money to Mrs. Downey?" the witness stated "I did." The Government produced a receipt signed by "Gerry Downey" which was read into the record, and which stated, "10/25/68, received from Herbert Abell, $11,356." (Tr. pp. 34-35)

Certainly, it was incumbent upon the Government to prove not only that the money belonged to said Credit Union but also that same was under the control. possession, etc. of said Credit Union. Appellant respectfully submits that t there was no testimony to prove said ownership and custody of said funds.

The indictment further charges that the Department of Justice Federal Credit Union was " a body corporate, an institution chartered by the Bureau of Federal Credit Unions." The evidence of the Government falls far short of this allegation. In answer to Government counsel's inquiry whether or not the said Credit Union was incorporated under the Federal Credit Union Act, the witness replied:

"Well, I don't know that it is exactly called a corpora.ion. The Act provides for methods of forming this, it is a cooperative venture really, and it started as a cooperative venture * * * * * To my knowledge the Act does not specifically use the word "corporation". (Tr. pp. 38, 39 and 40)

There was introduced into evidence by the Government, Government's Exhibit No. 1, being an annual permit to operate, granted to the Department of Justice Federal Credit Union on the 2nd day of March, 1935. (Tr. pp. 31,32 33, 34). Said document indicated that same had been issued in compliance with Public Act No. 467, 73rd Congress, and that said Credit Union was authorized to transact business until December 31, 1936. No further documents or other evidence was introduced by the Government to prove that on October 25, 1968, the Department of Justice Federal Credit Union was duly authorized to transact business as an instituion chartered by the Bureau of Federal Credit Unions, under the requirements of the aforesaid Public Act.

The caption of the indictment indicates that the charge in connection with which the defendant waa indicted, was violation of Title 18 U.S.C. 2113(a), which statute the

Government attempted to set forth in the wording of the aforesaid First Count. Title 18 U.S.C. 2113(a) provides;

> "Whoever, by force and violence, or by intimidation, takes * * * * * property or money * * * * * belonging to, or in the care, custody, control, management or possession of, any bank, or any savings and loan association * * * * *".

Under section (b) of said paragraph the term "savings and loan association" means any Federal savings and loan association and any insured institution, as defined in section 401 of the National Housing Act, as amended, and "any Federal credit union", as defined in section 2 of the Federal Credit Union Act.

It is fundamental that the Government must produce probative evidence of each and every element of the crime charged in the indictment and that failure to offer such proof is fatal to the Government's case. It is equally fundamental law that a jury shall not be permitted to speculate or surmise facts not proven.

Because of the Government's failure to prove beyond a reasonable doubt each and every element of the charges contained in the First Count of the indictment, the verdict of the jury was clearly contrary to the evidence and the law.

II

Did the Trial Judge err in submitting the First Count to the jury and further err in instructing the jury in connection with the First Count?

For the reasons stated in Paragraph I, the appellant respectfully submits that the Trial Judge erred in submitting the First Count to the jury and not granting a verdict of dismissal of said First Count. Appellant adopts and incorporates herein, his argument and statements contained in Paragraph I.

It is further contended that the Trial Judge erred in instructing the jury with respect to the First Count of the indictment. His Honor instructed the jury as follows:

> "Now, the First Count in the indictment charges the defendant with taking money <u>belonging to and in the custody and control of a Federal Credit Union</u> chartered by the Bureau of the Federal Credit Unions, and you are instructed as a matter of law that such a credit union may be considered by you as a savings and loan institution within the meaning of the law, that is, within the meaning of U.S. Code, Section 2113 (underlining supplied) (Tr. p. 320)

"Now, the Court instructs the jury that the law is that: "Whoever by force and violence or by intimidation takes or attempts to take from the person or the presence of another by placing the person in fear any property or money or any other thing of value belonging to the Federal Credit Union or in their custody or control or presence, that is, property belonging to a savings and loan association." (Underlining supplied)Tr. pp. 320, 321, 322).

The instructionss were contradictory. In the Trial Judge's first charge he used the conjuctive and, belonging to and in the custody and control of the Federal Credit Union, which was according to the language of the indictment. However, in quoting from the Code provision, the Trial Judge used the disjunctive or, belonging to or in their custody or control. First the jury was told that the Government must prove both facts, that is, that the money belonged to and was in the custody of the Credit Union. Then, contrary to his first charge, the Trial Judge stated that the jury had to find either one of said facts, that the money belonged to or was in the custody of the Credit Union. (Tr. pp. 321 - 322).

Appellant further respectfully submits that His Honor also erred in instructing the jurty that:

> * * * * * * as a matter of law that such a credit union may be considered by you as a savings and loan institution within the meaning of the law * * * * * *". (Tr. p. 320)

It is fundamental law that the function of the jury is to decide the facts but notwithstanding the Trial Court took that function away from the jury when he told the jury that said Federal Credit Union as a matter of law wasan institution within the meaning of the offense charged. It was the duty of the Government to prove beyond a reasonable doubt each and every element of the crime charged by presenting the facts to the jury, and one of the elements of the crime charged in the First Count was that said Credit Union qualified as an institution subject to the provisions of said alleged violation. A defendant has the constitutional right to have a jury decide all relevant issues of fact and to have the jury weight the credibility of witnesses.

The Trial Judge, therefore, committed plain error by his failure to direct a verdict of acquittal as to said First Count and by his instructions to the jury, as hereinabove stated (Rule 52(b), Fed. R. Crim. P.).

III

Did the Trial Judge err in failing to direct a verdit of acquittal with respect to the Fourth Count of the indictment?

The Fourth Count of the indictment charged the defendant as follows:

> "On or about October 25, 1968, within the District of Columbia, Alfred J. Meachum * * * * assaulted Ronald O. Boyd with a dangerous weapon, that is, a pistol."

Mr. Boyd, the complaining witness under the Fourth Count, testified that when he rushed out of the door, he noticed two men running very fast; that they were on the other side of the street; that the "shorter guy" turned and fired a couple shots at him; that "It was a flash, and then he was out of sight." (Tr. p. 83) He further testified that the only description he could give as to the one that shot at him was that said individual was "light complected, and he was shorter than me. I don't know exactly how sho..' Mr. Boyd gave his own height as being 5'8". He stated that the other individual was taller than he, "Maybe 3 or 4 inches taller than me." (Tr. p. 84)

Mr. Boyd further testified that he had known the defendant since birth. He stated that he could not say whether or not the defendant was the person who shot at him; that he did not believe it was someone he knew because "if it was somebody

that I knew I would have noticed something about him, because I can recognize somebody I know at a great distance." (Tr. pp. 85 - 86)

Government witness Clarence B. Mills testified that he heard a screaming noise like that of a lady and when he looked around he observed two men running from the building on the northwest corner of 8th and M Streets, S.E; that he saw the tallest one, "the one carrying a tan attache case, wheeled and fired two shots from a nickle-plated pistol." (Tr. p. 89) He stated that the two men were of the Negro race; that one was approximately 5 foot 6 inches and the other was approximately an inch or so smaller. (Tr. p. 91) He stated that the tallest one was of light brown color and that the smaller one was a little darker. (Tr. p. 92)

The evidence adduced by the Government as to which of the two men fired the shots was contradictory and therefore of no probative value. Neither the complaining witness Boyd or witness Mills identified the defendant as the person who assaulted Mr. Boyd. The Court therefore should have directed a verdict of acquittal with respect to the Fourth Count.

IV

Did the Court err in permitting identification evidence to be presented to the Jury?

Complaining witness Gerald Downey testified that (Tr. pp. 41 - 71) she arrived at the building at 6th & I Streets, S.E., about 10 minutes of 10:00 A.M. She stated that as she walked into the lobby of the building, she was approached by a man; that he put a gun in her face and told her not to scream at the same time taking from the satchel containing said money; that the man shoved her down and ran out of the door. She said there was another man there but she did not see him.

The Court permitted an identification hearing out of the presence of the jury, (Tr. pp. 47 - 61) during which the witness stated she never gave the police any description of the man who held the gun in her face. (Tr. p. 53) She made an in-Court identification of the defendant; she stated she had previously identified the defendant from a photograph which had been shown to her by F.B.I. Special Agent Ben Helsel, at her place of employment on December 13, 1968; also that she had identified the defendant in a line-up on December 17, 1968.

The witness further testified that she had talked to officers of the police department on several occasions, and that prior to December 13, 1968, she told the officers that

she did not think she could identify the person who held the gun to her face. Asked what cause her to change her mind, she replied that "It was the picture itself." (Tr. p. 60)

At the conclusion of the testimony out of the presence of the jury, the witness Downey, resumed her testimony before the jury. (Tr. pp. 67 - 75)

The witness made an in-Cour identification of the defendant. (Tr. p. 68) She stated that on December 13, 1968, she had occasion to view nine photographs at the Department of Justice Credit Union Office, which were presented to her by F.B.I. Agent Helsel. She stated she identified the defendant from one of said photographs; that subsequently on December 17, 1968, she appeared at a line-up of various subjects and identified the defendant. (Government's Exhibit No. 3)

The witness stated that she told the police on December 13, 1968, just prior to her identifying the defendant's picture, that she did not think she could identify either of the two men involved in said alleged offense. She said the reason she changed her mind about the identification was "Strucktly by sight. I just recognized this as the man. That is all I can tell you. The picture that I had in my mind of him, I guess. (Tr. p. 70)

On cross-examination the witness stated on several occasions that she told the officers prior to December 13, 1968, that she could not identify either of the two men. (Tr. pp. 71 - 74)

It is respectfully submitted that if a person at the time of an offense or shortly thereafter is unable to give a description of the offender and says at that time and on several occasions thereafter that she is unable to identify the alleged offender, that person will be in no better memory or position to identify said offender two months later. Any identification two months later must be viewed with suspicion as being tained and unreliable.

Mrs. Downey's selection of the defendant in the line-up on December 17, 1968, adds nothing to the matter of identification. The witness had seen a photograph of the defendant two days earlier and the defendant's face was fresh in her mind. The line-up in itself was unfair for the reason that the other subjects had entirely different facial features and skin coloring.

Sub-consciously Mrs. Downey no doubt felt she must select someone from the photographs shown to her, especially since she knew that the photographs were from the criminal files of the F.B.I. and there was some reason why only nine photographs were exhibited to her. It is possible she felt the F.B.I. had information that one of the men depicted by the photographs was the actual culprit.

If the witness had really obtained some view of any consequence of the face of her assailant, she would have been able to give some description at the time she talked to the police shortly after the attack. By failing to give any description to the police it is apparent that Mrs. Downey did not get a sufficient glimpse at her attacker to be able to identify him. No special skill or experience is required of one to enable him to describe the appearance and face of a person he or she had seen a few moments prior to giving said description. The additional fact that Mrs. Downey told the police she could not identify the person who took the money lends weight to the conclusion that Mrs. Downey's subsequent identification of the defendant is not trustworthy.

Witness Boyd was unable to state whether or not the defendant was the man he saw running and who shot at him; he

> "But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at line-ups and other forms of identification confrontations. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on * * * *."

Mason v. United States, 134 U.S.App.D.C. 200, 414 F.2d 1176 (1969) speaks of the dangers involved in connection with identification of suspects and states:

> "These dangers may result from such diverse influences as the witness's desire to cooperate with the police, from his knowledge that he is expected to identify some one he sees * * * * * from uncertain recollections of a stranger's face distorted by a mental focus on particular features, from a generalized feeling of anger or vengence, from suggestions subtly planted by the conduct or demeanor of a nearby policeman or other witness * * * * * and of course from a fortituous line-up grouping which makes the defendants conspicuous or unique."

Simmons, et al v. United States, 390 U.S 377 (1968) in passing upon the question of identification by photographs, states as follows:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures

> "But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at line-ups and other forms of identification confrontations. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on * * * *."

Mason v. United States, 134 U.S.App.D.C. 200, 414 F.2d 1176 (1969) speaks of the dangers involved in connection with identification of suspects and states:

> "These dangers may result from such diverse influences as the witness's desire to cooperate with the police, from his knowledge that he is expected to identify some one he sees * * * * * from uncertain recollections of a stranger's face distorted by a mental focus on particular features, from a generalized feeling of anger or vengence, from suggestions subtly planted by the conduct or demeanor of a nearby policeman or other witness * * * * * and of course from a fortituous line-up grouping which makes the defendants conspicuous or unique."

Simmons, et al v. United States, 390 U.S 377 (1968) in passing upon the question of identification by photographs, states as follows:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures

> of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification * * * * * * * Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."

The evidence indicated that the defendant was in custody of the police department on December 11, 1968, two days before Mrs. Downey viewed the aforesaid photographs. Officer Zimmerman testified he took the fingerprints of the defendant on December 11, 1968 (Tr. p. 110) and intimated that the defendant was in custody of the policy at that time. (Tr. p. 116) Therefore, the defendant being in custody prior to the aforesaid photographic identification, the appellant questions the procedure of the government by not having a line-up prior to the showing of the photographs to Mrs. Downey in order that a proper identification confrontation might have been made in accordance with the rulings of the Supreme Court.

Defendant was therefore denied his constitutional right of due process of law by the failure of the Government to first have held a line-up confrontation at which the defendant could have been represented by counsel for the

protection of the defendant's constitutional rights. The government for some unknown reason decided to have Mrs. Downey view nine photographs and then follow up said procedure with a line-up.

V

> Was the failure to have counsel present at photographic confrontation on December 12, 1968, a violation of defendant's constitutional rights?

Appellant respectfully submits that the failure of the Government to have counsel present on December 13, 1968, at the time Mrs. Downey first viewed the photographs presented to her by F.B.I. Agent Helsel, was a violation of due process of law and the constitutional rights of the defendant. Stovall v. Denno, 388 U.S. 293 (1967) announced that:

> "The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a 'critical stage', and that counsel is required at all confrontations." (underlining supplied)

The terms "all confrontations" as used by the Supreme Court in Stovall conveys the conclusion that the Court not only referred to line-up confrontations but also to photographic confrontations; that the presence of counsel is

required at all photographic confrontations which are a "critical stage" of pretrial procedure. The Trial Court therefore should have excluded all testimony relating to Mrs. Downey's photographic identification on December 13, 1960. The Court should likewise have excluded Mrs. Downey's identification at the line-up on December 17, 1960, as having been tained by the unfair photographic confrontation of two days earlier.

VI

Did the Court err in admitting evidence by Officer Zimmerman respecting fingerprints of the defendant taken on December 11, 1960?

Officer Zimmerman (Tr. pp. 115 - 121) testified in the course of his duties as a member of the Metropolitan Police Department, he had the occasion to take impressions of the defendant's fingerprints. He identified Government's Exhibit No. 7, as a fingerprint card containing the defendant's fingerprints. Replying to the prosecutor's inquiry, Mr. Zimmerman testified that he took the defendant's fingerprints on December 11, 1960. Over appellant's objections, said exhibit and testimony were admitted into evidence (Tr. p. 120) In discussing appellant's objection at a Bench conference, the prosecuting attorney stated: (Tr. p. 120)

"Your Honor, for the record, may I state this. Actually, the defendant Meachum's fingerprints were made out prior to this card being taken, but they were made out from fingerprints cards on F.B.I. file, which would indicate a prior record.

"The reason I am using this fingerprint card is it only shows a fingerprint card for the arrest of this offence. There has been a comparison made by the F.B.I. with the other card. To avoid prejudice, I use this card."

Officer Zimmerman testified that Government's Exhibit 7 was an F.B.I. fingerprint card for their files; that one was made for each defendant for the F.B.I. He stated that the name shown was that of defendant Meachum and that the card contained also his height, weight, date of birth, etc. (Tr. p. 117) He further stated that said fingerprints are classified and that he took them personally from the defendant; that the defendant instead of signing his name, printed his name on the card in the officer's presence. (Tr. pp. 117 - 118)

Adding to the prejudice created by the aforesaid testimony, was the testimony of the F.B.I. Agent Helsel, that the photograph of the defendant which Mrs. Downey had selected on December 13, 1968, showed a photograph of the defendant "From about just below the shoulders up." (Tr. p. 80)

In his summation to the jury, the prosecuting attorney referred to the photograph as "showing the upper torso of the defendant." (Tr. p. 276)

The aforesaid testimony of the officer and said photograph reference to the jury by the prosecutor led the jury to reach the conclusion that the defendant had been arrested on or prior to December 11, 1960, for some other offense or had been in prison for some other criminal purpose than that of the charges for which he was being tried. It is public knowledge that photographs of persons arrested for crimes usually show the upper torso of the defendant, being a typical "mug" shot from the "rogues' gallery" of the police department.

The admission of Government's Exhibit No. 7, Officer Zimmerman's testimony with respect to his taking defendant's fingerprints on December 11, 1960, (two days prior to December 13, 1960, when the defendant was first identified as the person who committed the offense charged herein), and the testimony and prosecutor's reference to the type of photograph from which identification was made, was plain and substantial and prejudicial error and in violation of the defendant's constitutional rights of due process.

Barnes v. United States, 124 U.S.App.D.C. 310, 365 F.2d (1966), involved an appeal from a conviction for housebreaking, etc. The defendant therein, as in the present case, did not testify or take the stand, but the lower Court permitted a "mug shot" of the defendant to be introduced into evidence, after strips of adhesive tape had been placed upon the photograph to cover the prison numbers and also other covering on back of the exhibit to obscure written material. In reversing the conviction, this Honorable Court held:

> "We think the introduction of the mug shot was substantial and prejudicial error that requires reversal.
>
> "It is well-settled law that the criminal record of a defendant may not be introduced into evidence at trial unless the defendant takes the stand or otherwise places his character in issue. A photograph which on its face reveals the existence of such a criminal record is likewise inadmissible when the defendant's character has not been placed in issue.
>
> "* * * * * * No such reasoning can justify Government Exhibit 3 in this case. The double-shot picture, with front and profile shots alongside each other is so familiar from 'wanted' posters in the post office * * * * * that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic.

"The probability that Government Exhibit 3 impressed upon the jury the fact of appellant's prior criminal record is too substantial for us to ignore. We find prejudicial error requiring a new trial."

The aforesaid evidence and statement of the prosecutor conveyed the impression to the jury that the defendant Meachum had a criminal record, or had at least been in trouble with the police prior to the time he was first identified, notwithstanding that the defendant did not take the stand or put his character in issue.

VII

Did the Trial Court err in permitting evidence of the taking of the fingerprint from the automobile to be presented to the jury?

The Government called as a witness Mr. Robert D. Forester, a fingerprint expert who testified that on October 25, 1968, he lifted a fingerprint from a 1969 two-door white Javelin, Rambler-type automobile; that he obtained said print from the left front door glass, next to where the driver would be; that said print was in a position upside down, just below the top of the glass approximately an inch and a half, and approximately six inches in from the upper righthand corner of said glass. (Tr. pp. 127 - 128)

He testified that the glass would have had to have been grasped from the inside of that door, "because in the area it was in, it would have been impossible to have turned the hand to place it in that position." He stated that he compared that finger print with the fingerprints on Government's Exhibit No. 7 (Tr. p. 130) and that it was his opinion that the fingerprint he had lifted (Government's Exhibits Nos. 8 and 9) from the automobile was made by the same finger that made the fingerprint, left middle fingerprint block, on the fingerprint card which is Government's Exhibit No. 7.. (Tr. p. 131)

There was no testimony whatsoever by the Government as to when said fingerprint was made on the automobile in question. The automobile from which said alleged print was taken was a rental automobile from the Avis Rent-a-Car company (Tr. p. 231) and had been driven some 2,500 miles, indicating that said automobile was not inaccessible to the defendant and others. If the jury believed said fingerprint was that of the defendant, it could have believed that the defendant touched said automobile during the commission of the said crimes or that he might have touched the automobile long before said car was allegedly used as the get-away automobile.

However, the jury had no evidence whatsoever upon which to base a decision as to when the said fingerprint was placed on the automobile. The conclusion of the jury would have been based on speculation alone. The evidence being so inconclusive, a reasonable person must have a reasonable doubt as to whether said fingerprint was placed on the automobile during the commission of said crimes. The Court should have supressed said fingerprint evidence and it was plain error not to have done so.

Borum v. United States of America, 127 U.S.App.D.C. 40, 350 F.2d 595 (1967) wherein the Government failed to prove that the objects touched were generally inaccessible to the defendants, holds:

> "Fingerprint evidence is very reliable. * * * * But to allow this conviction to stand would be to hold that anyone who touches anything which is found later at the scene of a crime may be convicted, provided he was within a mile and a half of the scene when the crime may have been committed. We decline to adopt such a rule."

Hiet v. United States of America, 124 U.S.App.D.C., 313, 365 F.2d 504 (1966) involved a fingerprint that was found on an automobile window. There was no evidence as to the probable age of the print. The automobile had been left on a public street and had been jimmied open and various articles taken from the car. This Court held in reversing the lower Court that:

> "The print may have been put on the window on any one of those days or nights. * * * * * * * * * Unquestionably the print raises a suspicion. But a suspicion, even a strong one, is not enough. Guilt must be established beyond a reasonable doubt, and each and every element of the offense charged must be established beyond a reasonable doubt."

Cephus v. United States, 117 U.S.App.D.C. 15, 324 F.2d 893 (1963) also involved the discovery of the defendant's fingerprint on a stolen automobile. This Court held that the finding of the defendant's fingerprint on the automobile was insufficient to sustain a verdict of guilty and that the trial court erred in denying motion for judgment of acquittal.

VIII

> Did the Court err in failing to instruct the jury that the Government must prove each and every essential element of the crime charged in the First Count, beyond a reasonable doubt?

His Honor instructed the jury as to the First Count as follows:

> "Now in the event * * * the Government has proved that the money was taken from Miss Downey * * * * * that the money belonged to the Savings and Loan, * * * * * and they have proved that it was taken with the specific intent to permanently deprive the rightful owners or the people in charge of that money, and that it was the intent to convert it to his own use, if you find that the defendant was the person who committed that offense, and you find out the Government has proven that beyond a reasonable doubt, then you may find the defendant

> guilty as charged. If you find that the Government has failed to prove any one of the essential elements contained, that to have been explained to you in Count 1, then it is certainly your duty to find the defendant not guilty." (Tr. p. 323)

The instruction given by the Court was confusing and contradictory. It is well-established law that the Government must prove each and every element of the offense charged beyond a reasonable doubt, but the Trial Judge failed to instruct the jury accordingly. The jury was told only that it may find the defendant guilty if it found that the defendant was the person who committed the offense and that that was proved beyond a reasonable doubt. Later in said instruction the Court stated merely that "If you find that the Government has failed to prove any one of the essential elements contained, * * * then it is certainly your duty to find the defendant not guilty." In this portion of the instruction the jury was given a lesser yardstick upon which to make its finding than the law demands. It is therefore respectfully suggested that the Trial Judge committed plain error when he failed to instruct the jury that the Government is required to prove each of the elements of the crime charged beyond a reasonable dout. Heit v. United States (supra) holds: "Guilt must be established beyond a reasonable doubt, and each and every element of the offense charged must be established beyond a reasonable doubt."

Appellant adopts and incorporates herein his argument under Issues I, II, III, IV, V, VI and VII.

IX

Did the Court err in failing to grant motion for judgment of acquittal?

At the close of the government's case, the defendant moved for a judgment of acquittal on all counts contained in the indictment. The Court denied said motion. (Tr. pp. 162 - 173) Counsel for the defendant renewed his motion for judgment of acquittal at the close of the entire case. The Court denied said motion. (Tr. p. 269) Appeallant respectfully submits that the denial of said motion was error.

In Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229 (1947) this Court had occasion to determine the standards to be applied by trial courts in considering defense motions for acquittal at the close of the Government's case. Curley holds:

> "The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. * * * *

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. * * * *."

Cooper v. United States, 94 U.S.App.D.C. 343, 218 F.2d 39 (1954) holds:

"Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence."

Mrs. Downey's photographic identification of the defendant is not based on any independent recollection of the identity of her assailant. Her testimony indicates considerable vagueness and uncertainty, in that she admitted she gave no description of her assailant and that she told the police and others that she could not identify her attacker. Even at the time she first viewed said photographs

Mrs. Downey stated: "I told him at the time, even before I looked at them, that I wasn't sure that I could." (Tr. p. 55)

Mrs. Downey was asked what caused her to change her mi mind about her identification of the defendant. She stated: "Strictly by sight. I just recognized this as the man. That is all I can tell you. The picture that I had in my mind of him, I guess." (Tr. p. 71)

The Government's case rested mainly upon Mrs. Downey's photographic identification of the defendant. A reasonable person might fairly conclude that, because Mrs. Downey was unable to give any description of her assailant at any time prior to her selection of said photograph and because of her various statements that she could not identify the person, there was no independent basis upon which Mrs. Downey relied to identify the defendant other than the picture which she saw at her office on December 13, 1968. Any other conclusion would have to be based upon surmise and conjecture.

X

Did the Government commit error when the prosecutor in his summation commented on defendant's failure to take the stand?

In his summation to the Jury the Government's attorney, Mr. Alto, committed plain error when he stated:

> "A comment was made as to why there was no testimony as to the car used, of defendant Mechum: Why didn't defense counsel ask him the question? He might have found a very interesting answer: It is not even relevant. You know what car was used. The car the police officer testified to was definitely the fingerprint of the defendant, found in the car." (Tr. p. 310)

Counsel for appellant has made diligent search of the transcript of the proceedings and can find no record whatsoever of any comment by the defense as to why there was no testimony regarding the car that was used in the alleged robbery. The defendant choose to stand on his constitutional rights not to testify. The prosecutor's comments therefore were improper and prejudicial, and were in violation of the defendant's constitutional rights.

Tomlinson et al v. United States, 68 App.D.C. 106, 93 F.2d 652 (1937) states:

> "The privilege of the defendant against self-incrimination and its corollary, the prohibition against comment by counsel for the government upon his failure to testify, have been jealously protected by the courts."

In the case on appeal, the prosecuting attorney's remarks directly commented on the defendant's failure to take the stand and he further made a misstatement by telling the jury that a comment had been made "as to why there was no testimony as to the car used, of defendant Meachum."

CONCLUSION

While it is the position of the Appellant that any one of the aforementioned errors allegedly committed is sufficient to warrant reversal, it is submitted that should this Honorable Court feel that there is no single error warranting reversal, the cumulative effect of the various errors alleged certainly does warrant a reversal. Therefore, the judgment of conviction on each count should be reversed by this Court and a judgment of acquittal entered or such other relief be granted as to this Court may seem just and proper.

Respectfully submitted,

MAURICE A. GUERVITZ
1010 Vermont Avenue N.W.
Washington, D.C. 20005
Appointed Counsel for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,109

UNITED STATES OF AMERICA, APPELLEE

v.

ALFRED J. MEACHUM, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
VINCENT R. ALTO,
Assistant United States Attorneys.

THOMAS M. LOCKNEY,
Attorney, Department of Justice.

Cr. No. 1295-69

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the evidence was sufficient to support the verdict.
2. Whether the trial court erred in admitting identification evidence consisting of a fingerprint found on the getaway car, a photographic identification, a lineup identification and an in-court identification.
3. Whether the jury was properly instructed.

---

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,109

UNITED STATES OF AMERICA, APPELLEE

v.

ALFRED J. MEACHUM, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a four-count indictment filed August 12, 1969, appellant and a co-defendant, John A. Malloy, were charged with one count of robbery of a federal credit union (18 U.S.C. § 2113 (a)), one count of robbery (22 D.C. Code § 2901) and two counts of assault with a dangerous weapon (22 D.C. Code § 502). The two defendants were severed on the Government's motion, and appellant went to trial alone before Judge Walsh and a jury on January 14, 1970. On January 16 the jury found him guilty of robbery of a federal credit union (count one) and assault

with a dangerous weapon (counts three and four).[1] He was sentenced on March 11, 1970, to imprisonment for four to twelve years on count one, one to three years on count three, and one to three years on count four, the sentences to run concurrently. This appeal followed.

The evidence showed that on the morning of October 25, 1968, Mrs. Geraldine Downey, a cashier at the Department of Justice Federal Credit Union, after receiving $11,856.00 in cash from Herbert Abell, the assistant manager at that time, proceeded with Mr. Grant, the manager, from the main office at 9th Street and Pennsylvania Avenue, N.W., to a branch office in the Immigration and Naturalization Service building at 8th and M Streets, S.E. (Tr. 41-43). After being dropped off by Mr. Grant, Mrs. Downey entered the building at approximately 9:50 a.m. As she walked into the lobby and turned to go upstairs, a man approached her from behind. When she turned to face him, he stuck a gun in her face and told her not to scream, at the same time taking the bag of money from her hand (Tr. 43). Despite the robber's warning, Mrs. Downey's natural reaction prompted her to scream. She was then shoved to the floor. Another man was present during the assault and robbery, but he stood with his back to Mrs. Downey and she could not see him (Tr. 44). The building guard, Mr. Ronald Boyd, heard the scream and, after briefly stopping to ask Mrs. Downey what had happened, rushed outside after the two men. As he emerged from the building, he saw two men running down the opposite side of H Street. One of them turned and fired several shots at Boyd (Tr. 82-85).

Appellant was linked to the robbery and assault in the following manner. As the two men fled the building, they were seen running by Mr. Clarence Mills, who had heard Mrs. Downey's scream while approaching the intersection of 8th and M Streets in his truck. He noticed

---

[1] The jury was instructed not to consider count two, charging robbery under 22 D.C. Code § 2901, if they found appellant guilty on count one (Tr. 324).

the taller man, carrying a tan attaché case, turn and fire two shots from a pistol. Both men then entered a white Javelin with Maryland license plates (Tr. 88-89). Mr. Neil Woodcock, a bus driver, while sitting in his bus parked on Potomac Avenue between 8th and 9th Streets, S.E., also saw the men run out of the building and drive off in a car, which he thought to be blue rather than white and possibly a Chevrolet. As the car drove past him, he wrote down the license number on a bus transfer (Tr. 94-101).

Later in the day Mr. Mills, accompanied by an FBI agent, viewed a car in an alley and identified it as looking like the getaway car (Tr. 89-90). The car was then taken for examination by an FBI fingerprint expert (Tr. 103-106). The expert testified at trial that a fingerprint found on the left front door window of the car matched the fingerprint of appellant's left middle index finger (Tr. 127, 130-131, 141) and that, because of its position on the window, it would have to have been left by a person sitting inside the car (Tr. 127-128).

On December 13, 1968, Mrs. Downey identified a picture of appellant out of a group of nine photos shown her by an FBI agent (Tr. 48-50). Four days later she identified appellant at a lineup (Tr. 57-58). She identified appellant at trial as the man who took the money satchel from her (Tr. 47).

Appellant's defense consisted entirely of the testimony of two witnesses, a cousin and a friend, through whom appellant attempted to establish an alibi defense.

ARGUMENT

I. The evidence was sufficient to sustain the verdict.

(Tr. 29-161)

Appellant challenges the sufficiency of the evidence on the first count to show that the money taken belonged to the credit union, that the money was in its care, or that the Department of Justice Federal Credit Union was an institution protected by 18 U.S.C. § 2113. He also argues

that the evidence did not show that the assault charged in the fourth count of the indictment was in fact perpetrated by appellant. However, when the evidence is viewed in accordance with the applicable law,[2] in the light most favorable to the Government, it amply supports the verdict on both challenged counts.

A. *The money taken belonged to the credit union or was in its care, custody, control, management or possession.*

18 U.S.C. § 2113 punishes robbery of a savings and loan institution, defined in subsection (g) to include any "Federal credit union" as defined in section 2 of the Federal Credit Union Act, 12 U.S.C. § 1752.[3] The allegation in the indictment was that the credit union was "an institution chartered by the Bureau of Federal Credit Unions, Department of Health, Education and Welfare."

Mr. Herbert Abell, manager and assistant treasurer of the credit union at the time of trial, testified that the original charter was issued to the credit union on March 2, 1935, by the Farm Credit Administration. A copy of that charter was admitted into evidence (Tr. 33). Mr. Abell testified further that the authority governing federal credit unions was subsequently transferred to the Federal Deposit Corporation [*sic*], then to the Federal Security Agency, then to another agency, the name of which he could not recall, and ultimately to the Department of Health, Education and Welfare (Tr. 30-33, 39).

---

[2] *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

[3] That statute provides in pertinent part:

> As used in this chapter—
>
> (1) the term "Federal credit union" means a cooperative association organized in accordance with the provisions of this chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes . . . .

A review of the history of the Federal Credit Union Act and the statutory transfers of administrative power thereunder indicates that Mr. Abell was substantially correct in his thumbnail history of the Act. It was originally enacted in 1934,[4] and subsequent transfers of authority were made in 1939,[5] 1947,[6] 1948,[7] and 1953.[8] Mr. Abell's testimony had the effect of showing a continuous line of authority to administer the functions of the Bureau of Federal Credit Unions. No more was required, especially since the proof was uncontradicted and the coverage of the Act was not really in dispute. *See United States* v. *Ballard*, 418 F.2d 325 (9th Cir. 1969); *Callahan* v. *United States*, 367 F.2d 563 (9th Cir. 1966); *Cook* v. *United States*, 320 F.2d 258 (5th Cir. 1963).

Appellant also contends that the Government failed to prove that the money was taken from a "body corporate" (Appellant's Brief at 24-25). This contention is based on extraction of a quotation from the record, taken out of context, where Mr. Abell said:

> Well, I don't know that it is exactly called a corporation. The Act provides for methods of forming this, it is a cooperative venture really, and it started as a cooperative venture . . . . To my knowledge the Act does not specifically use the word "corporation." (Tr. 39-40.)

In context, however, it is clear that Mr. Abell meant only that the credit union was not a corporation in the sense of being organized as such under the laws of a particular state. He testified that several incidents of a corporate nature characterized the credit union, such as having a board of directors responsible for its operation,

---

[4] Act of June 26, 1934, ch. 750, 48 Stat. 1216.

[5] 1939 Reorg. Plan No. 1, § 401, 53 Stat. 1429.

[6] 1947 Reorg. Plan No. 1, § 401, 61 Stat. 952.

[7] Act of June 29, 1948, ch. 711, 62 Stat. 1091.

[8] 1953 Reorg. Plan No. 1, 67 Stat. 632.

with liability limited to the assets (Tr. 38-40). In any event, the allegation in the indictment that the credit union is a "body corporate" is mere surplusage, not being a material element of the offense. Failure to prove the corporate nature is thus of no consequence. *See Lockhart* v. *United States*, 293 F.2d 314 (8th Cir. 1961).

Section 2113 of Title 18 is violated by the taking of money "belonging to, or in the care, custody, control, management, or possession of" a protected institution. Where a statute indicates alternative modes in which an offense may be committed, the proper method of charging in the indictment is to charge the alternatives conjunctively; and, under such a charge, proof of any one conjunct alone is sufficient to support the conviction. *Turner* v. *United States*, 396 U.S. 398, 420-421 and cases cited in n.42 (1970); *Jackson* v. *United States*, 123 U.S. App. D.C. 276, 359 F.2d 260, *cert. denied*, 385 U.S. 877 (1966); *District of Columbia* v. *Hunt*, 82 U.S. App. D.C. 159, 163-164, 163 F.2d 833, 837-838 (1947).

The money involved in this robbery was shown to be in the possession of Mrs. Downey, an employee of the credit union, having been given to her for the purpose of conducting official credit union business (Tr. 34-37). There is nothing in the record to indicate that the money belonged to or was in the care, custody, control, management or possession of Mrs. Downey in her own right. The jury was clearly permitted, if not compelled, to conclude that the money was credit union money, whatever the particular ownership rights of the credit union with respect to its members.

B. *The trial court properly denied appellant's motion for judgment of acquittal with respect to the fourth count of the indictment.*

Appellant contends that minor inconsistencies in the evidence adduced by the Government as to which of the two men shot at Mr. Boyd render that evidence devoid of probative value. That contention, however, ignores the function of the trier of fact in sifting out the truth from

the inevitable imperfections in the testimony given by fallible humans. As this Court has recently noted in *Coates* v. *United States*, 134 U.S. App. D.C. 97, 99, 413 F.2d 371, 373 (1969):

> [T]he fact of inconsistencies among the witnesses does not require that the testimony be rejected by a trier or triers of fact, but is simply a factor to be considered.

In *Brooke* v. *United States*, 128 U.S. App. D.C. 11, 15, 385 F.2d 279, 283 (1967), the Court said:

> [J]urors ordinarily may, and frequently do, accept some but not all of the testimony related by particular witnesses. Where the situation is conducive, they may support a finding by parts of the testimony of two or more witnesses, and may resort to both prosecution and defense sources.

The case at bar presents a situation most conducive to the sifting and winnowing of the evidence by the jury. Mrs. Downey identified appellant as the man who held the gun and snatched the money bag from her grasp (Tr. 47-69). Mr. Mills saw the man with the attaché case fire at Mr. Boyd (Tr. 89) and placed the height of the man firing the gun at about 5′6″ (Tr. 91). Mr. Boyd indicated that his assailant was somewhat shorter than his own height of 5′8″ (Tr. 84). The only inconsistency, then, is in their characterization of the other man as shorter or taller than the man firing the gun. This is not a reason to reject the jury verdict.

II. The evidence establishing appellant's identity as the robber was correctly introduced.

(Tr. 47-52, 55-60, 62-63, 66-69, 75, 77-81, 140-141, 161, 276)

Appellant was initially linked to the robbery through discovery of his fingerprint on the window of the getaway car (Tr. 140-141). Following the matching of the fingerprints, FBI Agent Helsel produced nine photographs, one

of which was a photo of appellant, for Mrs. Downey to view in an attempt at identification. No suggestions were made to her that any of the nine individuals were then suspected, and she was not prompted in any way (Tr. 55-56, 77-78). Mrs. Downey repeated her belief that she could not identify the man who took the money, but upon viewing appellant's picture she immediately changed her mind and identified him as the man who robbed her (Tr. 55, 60). Four days later Mrs. Downey again identified appellant as the robber at a lineup (Tr. 78-80). At trial Mrs. Downey again identified appellant (Tr. 47). Appellant's attack on this manifestly fair investigation is without merit.

A. *The fingerprint evidence linking appellant to the crime was properly admitted into evidence.*

Appellant confuses the sufficiency of the evidence with its admissibility. This case does not involve the question of whether the fingerprint evidence alone would be sufficient to convict appellant, which was the issue in the cases he relies on.[9] Here there was eyewitness identification in addition to the fingerprint evidence. The fingerprint evidence was, however, a circumstance of probative value tending to aid the jury in the determination of the defendant's guilt or innocence. *See Stevenson* v. *United States*, 127 U.S. App. D.C. 43, 45, 380 F.2d 590, 592, *cert. denied*, 389 U.S. 962 (1967).

The possibility that prejudicial inferences of prior criminality could be drawn by the jury from the fact they knew that there were in existence fingerprint cards used to make the identification is so minimal as to be harmless. Many people have their fingerprints taken for reasons entirely innocent, including employment by the

---

[9] *Borum* v. *United States*, 127 U.S. App. D.C. 48, 380 F.2d 595 (1967); *Hiet* v. *United States*, 124 U.S. App. D.C. 313, 365 F.2d 504 (1966); *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963).

government, a fact that is so well known that there can be no conceivable prejudice to appellant here.[10]

B. *The photographic identification was non-prejudicial.*

The question that must be answered in any case presenting an issue of improper photographic identification is whether "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). There was no unfairness here.

Mrs. Downey's failure to give a description of the robber and her apparent belief that she would be unable to identify him does not vitiate the validity of her later identification. As stated in WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 97-98 (1965):

> [A] witness may be capable of making a correct identification of the perpetrator of a crime even though his original description of that person was either inaccurate or very vague. There is, in other words, no necessary relationship between a witness's ability to observe accurately and his ability to verbalize accurately that which he has observed.

Despite Mrs. Downey's initial reluctance to attempt a description of the robber, her eventual recognition was

---

[10] Appellant also claims prejudice from the testimony of FBI Agent Helsel that the photograph of appellant viewed by Mrs. Downey showed him "from just below the shoulders up" (Tr. 80) and from the prosecuting attorney's reference in closing statement to the photograph as "showing the upper torso of the defendant" (Tr. 276). In *Barnes* v. *United States*, 124 U.S. App. D.C. 318, 365 F.2d 509 (1966), appellant's only cited authority for this contention, the "typical 'mug-shot' from a police department 'rogues' gallery'" consisting of "two close-up shots of appellant's face side-by-side, one full-face and one a profile photograph" was itself admitted into evidence for the jury's view. In the instant case, however, the photograph of appellant was kept out of evidence by the prosecutor, scrupulously striving to avoid prejudice rather than to create it (Tr. 161). *See also United States* v. *Lucas*, D.C. Cir. No. 23,428, decided November 19, 1970 (unreported opinion).

instantaneous (Tr. 66-67). She came to realize, after her excitement when she thought she could not identify the man (Tr. 75), that she knew she had seen him when he turned around and the gun was in her face (Tr. 60). She testified that the light was adequate to see the man (Tr. 52), and her in-court identification was positive and persuasive (Tr. 47, 62-63, 68-69). The question of the weight to be given to her testimony was for the jury.

The contention that appellant was entitled to the presence of counsel at the photographic identification has been rejected by this Court. *United States* v. *Kirby*, 138 U.S. App. D.C. 340, 342, 427 F.2d 610, 612 (1970):

> While a photographic identification may, indeed, present problems of fairness, the problem is to be considered in terms of whether the identification has has been conducted with impermissible suggestiveness, and not by a prophylactic rule requiring the appointment of counsel for one who is not present at the time of identification, has not been arrested for or charged with the crime, and is not in custody.

Here, as in *Kirby*, the police and prosecutor acted responsibly by preserving the photographs, which were available for viewing by the judge and by appellant and his counsel, thus rebutting any hint of suggestiveness (Tr. 49-51). The record is clear that appellant's photograph was not highlighted, nor was its selection prompted (Tr. 59-60, 77-78). *See United States* v. *Williams*, 137 U.S. App. D.C. 231, 421 F.2d 1166 (1970); *United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969).

There is some indication in the record that appellant was arrested on December 11 by the police, whereas the FBI did not show pictures to Mrs. Downey until December 13. Although no issue was made of this at trial,[11] ap-

---

[11] Appellant's trial counsel continues to represent him on appeal. At trial his objection went to the use in evidence of fingerprint cards taken at the time of appellant's arrest on the ground that there was no probable cause to arrest him before an identification

pellant now seizes on this suggestion on appeal and argues that counsel should have been present at the showing of photographs, contending that such a showing is a "confrontation" within the meaning of *United States* v. *Wade*, 388 U.S. 218 (1967), and *Stovall* v. *Denno*, 388 U.S. 293 (1967). Appellant's argument is meritless. The federal courts have consistently refused to apply *Wade* to photographic identifications. Since *Simmons* v. *United States*, *supra*, the only post-*Wade* case in which the Supreme Court has dealt with photographic identifications, the Second,[12] Fourth,[13] Fifth,[14] Ninth[15] and Tenth[16] Circuits have explicitly and unequivocally held that counsel is not required at a photographic identification.[17] Moreover, this Court has implicitly held that *Wade* does not apply to photographic identifications which take place even after arrest.[18]

Contrary to appellant's view, *Wade* and *Stovall* did not lay down a blanket rule prohibiting all types of identifications made in the absence of counsel. Instead the Su-

---

had been made (Tr. 118). The prosecutor explained that he used this card because the one actually utilized for comparison purposes would disclose a prior record.

[12] *United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1970).

[13] *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970).

[14] *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970).

[15] *United States* v. *Sartain*, 422 F.2d 387 (9th Cir. 1970).

[16] *Rech* v. *United States*, 410 F.2d 1131 (10th Cir.), *cert. denied*, 396 U.S. 970 (1969).

[17] The law in the Third Circuit is unsettled. *Compare United States* v. *Conway*, 415 F.2d 158 (3d Cir. 1969), *with United States* v. *Zeiler*, 427 F.2d 1305 (3d Cir. 1970).

[18] *United States* v. *Hamilton*, *supra*, in which the briefs show that the photographic identification complained of took place after the defendant was arrested. *See United States* v. *Kirby*, *supra*, 138 U.S. App. D.C. at 342 and n.2, 427 F.2d at 612 and n.2. *See also United States* v. *Robinson*, 406 F.2d 64 (7th Cir.), *cert. denied*, 395 U.S. 926 (1969).

preme Court recognized that the means of pretrial identification vary so much in type and circumstance that its duty in evaluating them for the purpose of requiring the presence of counsel demanded an analysis of "whether potential substantial prejudice to defendants' rights inheres *in the particular confrontation* and the ability of counsel to help avoid the prejudice." *Wade, supra*, 388 U.S. at 227 (emphasis added). Obviously, therefore, not all confrontations are "critical" for *Wade* purposes. This Court has directly acknowledged this fact as to uncounseled on-the-scene identifications, *Russell* v. *United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied*, 395 U.S. 928 (1969), and appellee submits that the same result should hold for the identification in appellant's case. In *Wade* the Supreme Court held that counsel was required at a lineup for three reasons: so that the accused would not have to "stand alone," [19] to prevent unfairness,[20] and to enable the defendant to reconstruct what occurred at that proceeding in order to defend himself properly at trial.[21] We think that in the case of a photographic identification none of these considerations has force sufficient to require a *per se* rule that counsel must be present when photographs are viewed by a witness. Appellant was not confronted by or forced to "stand alone" before anyone. Neither *Wade* nor any other Supreme Court decision even suggests that a defendant's right to counsel requires that his lawyer be present in situations in which the defendant himself is not a participant.[22] As for the danger of unfairness and reconstruction of the identification process, we submit that appellant's due process rights were adequately protected by his right of cross-examination. As *Simmons* stated:

> The danger that the use of the [photographic identification] technique may result in convictions or mis-

---

[19] 388 U.S. at 226.

[20] *Id.* at 235-236.

[21] *Id.* at 230-232.

[22] *See United States* v. *Bennett, supra* note 12, 409 F.2d at 899.

> identifications may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. 390 U.S. at 384.

Unfairness in a photographic identification stems from two general sources: the nature of the photographs themselves and the conduct of the police displaying them as it affects the viewer. Since, to our knowledge, no decision has held that counsel is entitled to question witnesses at *any* type of out-of-court identification proceeding, and such witnesses in any event are not under oath, the only practical way to determine the effect of the conduct of the police on the viewer is in court, where counsel and the judge can play their accustomed roles.[23]

C. *The lineup corroborated and strengthened Mrs. Downey's identification of appellant; and since it was conducted fairly, its weight was for the jury to determine.*

Appellant contends that the lineup identification on December 17, 1968, added nothing to the identification process. But when fairly conducted, as here, with counsel present, photographed and no prejudicial suggestiveness attending its conduct (Tr. 78-81), the lineup is a valuable tool for both the police and the accused in corroborating the photographic identification. As appellant correctly points out, there is a possibility of error in the photographic identification, but the three-dimensional viewing of the suspect in comparison with similar personages afforded by the lineup provides an additional opportunity either to confirm the identification already made or to correct an erroneous photographic identification. The

---

[23] The "logic" permitting defense counsel to attend a photographic identification would surely permit, if not require, that a prosecutor be present as well. Unless a neutral officiating party were also present—to make "findings of fact"—both counsel might well be put in the awkward position of subsequently having to testify in court regarding the circumstances of the identification. *Cf. United States* v. *Vereen*, —— U.S. App. D.C. ——, 429 F.2d 713 (1970).

effect that the prior viewing of the photograph may have on the subsequent lineup identification is for the jury to decide. If the lineup had not been held, appellant might have had greater cause to complain. *See United States* v. *Gaines*, D.C. Cir. No. 23,369, decided August 27, 1970, slip op. at 3; *United States* v. *McNair*, D.C. Cir. No. 22,372, decided April 8, 1970, slip op. at 4.

III. The court correctly instructed the jury.

(Tr. 313-334)

A. *The charge on the Government's burden of proof was correct.*

In instructing the jury on count one of the indictment, the court charged, after explaining the elements of the crime, that if the jury should find that:

> the Government has proven [the essential elements of the crime] beyond a reasonable doubt, then you may find the defendant guilty as charged. If you find that the Government has failed to prove any one of the essential elements contained, that have been explained to you in Count 1, then it is certainly your duty to find the defendant not guilty. (Tr. 323.)

Elsewhere in the instructions the court repeatedly emphasized the Government's burden of proof beyond a reasonable doubt (Tr. 315-316, 318-320, 324, 326-327, 330-333). That admonition is not necessary in every instruction. *Marks* v. *United States*, 260 F.2d 377, 381 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959). It is certainly not necessary in every clause or sentence of every instruction.

B. *The instruction on the right of a defendant not to testify rendered an ambiguous statement in the prosecutor's rebuttal argument harmless.*

The court's instructions included the admonition that "every defendant in a criminal case has the absolute right

not to testify. You must not draw any inference of guilt against a defendant because he did not testify during the trial" (Tr. 318).

In his lengthy rebuttal argument to the jury, the prosecutor had made the following statement (Tr. 310):

> An argument was made pertaining to the fingerprint expert, Mr. Forrester. Apparently, the defense counsel contests this was the defendant's print. You must bear in mind, of course, his qualifications, his positiveness as to this. The large amount of points in the identification, which was what they used to match up these fingerprints. A comment was made as to why there was no testimony as to the car used, of defendant Meachum: Why didn't defense counsel ask him the question? He might have found a very interesting answer: It is not even relevant. You know what car was used. The car, the police officer testified to was definitely the fingerprint of the defendant, found in the car.

Appellant contends that this statement constituted a comment by the prosecution on the defendant's failure to take the stand and was therefore improper and prejudicial and violated appellant's constitutional rights. No objection to this statement was made by appellant's counsel at trial, and no motion for mistrial was urged. Like *United States* v. *Reid*, 415 F.2d 294, 296 (10th Cir. 1969), *cert. denied*, 397 U.S. 1022 (1970), this is not a case where the comment of the prosecutor directly and unequivocally called attention to the failure of the accused to testify, nor a case where the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify. The statement was made in passing and was not repeated. Since the statement was not manifestly intended as, or of such character that the jury naturally and necessarily had to take it to be, a comment on the failure of the accused to testify, the instruction of the court removed any possibility of prejudice from the prosecutor's comment.

C. ***The trial judge correctly ruled that the credit union could be considered within the meaning of section 2113 as a matter of law.***

As noted above, there was ample uncontroverted evidence to show that at the time of the robbery the credit union was authorized to transact business as an institution chartered by the Bureau of Federal Credit Unions. The trial court, in light of the testimony, was warranted in noting its nature as a federal credit union within the meaning of the Federal Credit Union Act and 18 U.S.C. § 2113. The court's ruling, in effect taking judicial notice of the status of the credit union, falls within the ruling of *Gold* v. *United States*, 378 F.2d 588, 592 (9th Cir. 1967), where the defendant also requested:

> a reversal so that the case may be tried again upon the same uncontradicted evidence of the government . . . but without the court's judicial notice of the indisputable fact and its instruction to the jury that the fact existed.
>
> Such a reversal would be completely formalistic and useless and is not required in order to preserve the right to trial by jury. The defendant in a criminal case has a constitutional right that the jury, regardless of the evidence against him, may acquit him. But he does not have the right that the jury should be free, in its deliberations, to decide that the earth is flat.

Whether the federal character of the institution is characterized as a mixed question of law and fact, as a fact uncontradicted by opposing testimony, or as a straight question of law, the judge, under the facts of this case, was clearly justified in instructing the jury as he did.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
VINCENT R. ALTO,
Assistant United States Attorneys.

THOMAS M. LOCKNEY,
Attorney, Department of Justice.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 410878 384